Minority Rights for Immigrants? Multiculturalism versus Antidiscrimination

Christian Joppke[*]

Contemporary immigration has reinforced calls for minority rights in liberal states, which accrue to immigrants (but also to citizens) qua *member of an ethnic minority group. It is often overlooked that such minority rights may be of two kinds: multicultural rights that protect cultural differences or antidiscrimination rights that attack discrimination on these grounds. I argue that the importance of multicultural rights has been greatly exaggerated, and that much of the work attributed to them has in fact been accomplished by group-indifferent individual rights. By contrast, antidiscrimination rights are growing stronger, even in Europe. However, to the degree that it tackles indirect discrimination, antidiscrimination cannot but be factually group-making, even in states that reject multiculturalism.*

Introduction

By bearing or adhering to a distinct ethnicity, race, or religion, immigrants often constitute a minority group in the society into which they move. A classic text by Chicago sociologist Louis Wirth defined a minority group as "a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination."[1] Wirth's definition aptly captures the role of discrimination and inequality in the making of a minority. In this view, a minority only arises out of the discrimination inflicted on it by the majority. Extrapolating from Wirth, one may conceive of minority rights as protections from physical or cultural discrimination.

By the same token, Wirth[2] may overstate the other-defined, discriminatory origins of minority groups. For instance, Mary Waters found that the ethnic identifications today of Americans of European origin are entirely self-made and optional, and she distinguishes their "symbolic ethnicity" sharply from the "real and often hurtful"

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[*] Professor of Politics, The American University of Paris.

[1] Louis Wirth, *The Problem of Minority Groups*, *in* The Science of Man in the World Crisis 347, 347 (Ralph Linton ed., 1940).

[2] *Id.*

consequences of "being Asian or Hispanic or black."[3] Of course, one may refrain from calling self-defined Italian or Polish-Americans a "minority group," as Waters does herself; she prefers to call them an "ethnic group" instead.[4] But it would be unhelpful to make the modicum of self-definition that even in Wirth's[5] account is required for being a minority solely a function of external discrimination. Witness the recent re-labeling of American blacks into "African-Americans," which shows the need for positive self-definition even among a group that would not exist except for the gross discrimination that is slavery. There is likely to be a continuum between positive self-definition and negative other-definition in the making of a minority, and it is implausible to eradicate from it a positive sense of collective self that is not reducible to discrimination but that articulates a shared ethnicity, language, religion, or history.

The distinction between positive self-definition and negative other-definition in the making of a minority is not just academic. It points to a fundamental ambiguity of how the state should respond or relate to the minority: Should it be protected or should it be abolished in the name of equality? This alternative is often slighted, perhaps because immigrants themselves often slight it. In her valuable study of how immigrants "negotiate identities" in France and Germany, Riva Kastoryano, for instance, claims that immigrants struggle "against every form of exclusion … which ends in a demand for recognition."[6] This may well be, but there still is a distinction between both types of politics and concomitant state response, inclusion undoing the group *qua* group and recognition perpetuating it. In this Article, I refer to the first response as "antidiscrimination" and to the second as "multiculturalism," and I map out the rather different logics of both. However, even notionally group-destroying antidiscrimination cannot but be factually group-making, so that a modicum of de facto multiculturalism will persist even where there has been a philosophical rejection of it.

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[3] MARY WATERS, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA 156 (1990).

[4] *Id.* at 157. Mary Waters's distinction between ethnic and racial groups, the former being positively self- and the latter negatively other-defined, echoes Max Weber's famous discussion on "ethnic relations" (*ethnische Gemeinschaftsbeziehungen*) in his WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE 234-244 (1976).

[5] Wirth, *supra* note 1.

[6] RIVA KASTORYANO, NEGOTIATING IDENTITIES: STATES AND IMMIGRANTS IN FRANCE AND GERMANY 140 (Barbara Harshav trans., Princeton University Press, 2002).

I. MULTICULTURALISM

In the post-WWII era, Western states abstained from forcing immigrants to abandon their culture of origin as a price for admission. The mantra was "integration not assimilation," which left the cultural integrity of immigrants intact. The only question was whether such integration could be achieved within the established rules of private and public, or whether the line dividing both spheres had to be redrawn. More concretely, were immigrants free to follow their cultural ways in private and had the state to stay neutral on such matters or was a further, proactive stance on part of the state required to reshuffle the existing private-public distinction? Multiculturalism proper is the second response, according to which the state should not stay aloof but publicly recognize the minority group. To a certain degree, even international law has moved in this direction. One of the first post-WWII codifications of minority rights, the 1966 International Covenant on Civil and Political Rights, only asked states to refrain from certain actions, namely that minorities "shall not be denied the right" to their culture, religion, or language.[7] The 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities contains stronger and more proactive language that states shall "protect" and "promote" these minorities.[8] This may mean little change in reality,[9] but the distinctly more multicultural diction in the 1992 declaration is unmistakable.

What marks multiculturalism as a political stance has been influentially formulated by Charles Taylor.[10] Multiculturalism is depicted as expression of the "modern preoccupation with identity and recognition," which derives from modernity's collapse of social hierarchies and a new ideal of authenticity.[11] The novelty is not the *quest* for identity and recognition, which is grounded in the "dialogical" nature of human life. What is new is that this quest can *fail*, because identity is no longer immutably fixed by one's social position.[12] Under modern conditions, recognition engenders two

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[7] International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

[8] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, art. 1, annex, 47 U.N. GAOR Supp. No. 49 at 210, U.N. Doc. A/47/49 (Dec. 18, 1992) states: "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity."

[9] *See* the critique by WILL KYMLICKA, MULTICULTURAL ODYSSEYS (2007).

[10] CHARLES TAYLOR, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" (1992).

[11] *Id.* at 26.

[12] *Id.* at 35.

different kinds of politics: a "politics of universalism" that strives for the equal dignity of all individuals and "politics of difference" that asks to recognize the unique identity of this individual or group. Both politics are internally connected, as "[t]he universal demand powers an acknowledgment of specificity."[13] However, and this is the rub, the politics of difference operates as a polemic against the politics of universalism, which is accused of being a "particularism masquerading as the universal" and of "imposing a false homogeneity."[14] While such a stance can be found in radical feminism, Taylor traces it to Frantz Fanon's indigenous critique of colonialism. Much like Fanon's *The Damned of the Earth*, multiculturalism attacks "the imposition of some cultures on others, and … the assumed superiority that powers this imposition."[15] Positively phrased, multiculturalism, at least in the Taylorian variant, asks for the "presumption" of "equal worth" of the cultures denigrated by the West.[16]

Of course, this is only a variant of multiculturalism and one in which it is a radical alternative to, and critique of, liberalism.[17] In addition, there is a liberal variant, in which multicultural minority rights complement rather than substitute liberal rights and citizenship.[18] But constitutive for all variants is that minority identities have to be publicly recognized in a kind of special deal apart from the general rule of law, which does not know group distinctions. Even in Kymlicka's liberal variant, "benign neglect," the classical liberal state stance on religion does not work with respect to culture.[19] Try as it might, the liberal state can never be neutral in the choice of its public language, holidays, and symbols, which inevitably privileges the majority group. If equal justice is to prevail, the culture of minority groups needs special protection by the state.

To have one's identity recognized by the state has always been an implausible stance, not only with respect to immigrants. As Chandran Kukathas retorted to Taylor and Kymlicka alike, "recognition" is not something the liberal state can deliver:

> The liberal state … should take no interest in the character or identity of individuals; nor should it be concerned directly to promote human flourishing: it should have no collective projects; it should

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[13] *Id.* at 39.
[14] *Id.* at 44.
[15] *Id.* at 63.
[16] *Id.* at 68.
[17] For another influential radical variant, which is inspired not by anticolonialism but by feminism, *see* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).
[18] WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); *see also* Christian Joppke, *Multicultural Citizenship: A Critique*, 42 EUR. J. SOC. 431 (2001).
[19] KYMLICKA, *supra* note 18, at 108-15.

> express no group preferences; and it should promote no particular individuals or individual interests. Its only concern ought to be with upholding the framework of law within which individuals and groups can function peacefully.[20]

Liberalism, Kukathas sums it up, should be at heart a "politics of indifference."[21]

What Kukathas formulated as an "ought to" captures well the factual uneasiness that has always surrounded liberal state responses to multicultural claims. By definition an asymmetrical stance, recognition, in singling out one group, must whet the appetite of other putative groups to be recognized as well. Recognition, thus, not only vitiates the symmetry of the rule of law but is "almost always dangerous" in the real world, as Kukathas argues with an eye on the rougher quarters of South East Asia.[22] In fact, groups are often only called into existence by the recognition game itself. And this is a game that helps transform mundane interests, which are open to compromise, into ethereal identities that are not.

While an unlikely stance to take in the liberal state at large, recognition becomes especially implausible if applied to immigrants. Kymlicka actually admits this in his pragmatic concession that immigrants, by voluntarily leaving their homeland, have "waived" the right to have their culture and identity resurrected abroad.[23] The "polyethnic" rights that are granted to immigrants, such as exemptions from general laws that unduly restrict their cultural or religious ways or public funding for their cultural practices, are intended to promote "integration into the larger society, not self-government."[24] Only, in this healthily minimalist account it is not clear why such measures are couched in the language of rights; perhaps they are better conceived of as pragmatic concessions by means of which states seek to further the integration of immigrants.

The rights worthy of the name "rights" with respect to accommodating immigrants as cultural minorities are not special "polyethnic" rights, granted only to them and not to others. Instead, the most effective protections are the general rights of free expression and association, of privacy and family life, and of religious belief and practice that the liberal state grants to all individuals, immigrants and natives, residents and citizens.[25] For instance, much of Muslims' accommodation in liberal societies

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[20] CHANDRAN KUKATHAS, LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM 249 (2003).
[21] *Id.* at 250.
[22] *Id.* at 251.
[23] KYMLICKA, *supra* note 18, at 86-87.
[24] *Id.* at 31.
[25] One of the few rights with a cultural inflection, which are available to immigrant minorities but not to members of the majority group, is the so-called "cultural defense" in criminal law, which

has proceeded along this individual rights track. This has regularly brought courts, as the defenders of individual rights, into conflict with rights-constricting public authorities, with courts and their minority clients getting the upper-hand most of the time. Especially in continental Europe, with entrenched systems of judicial review and written constitutions, courts have routinely consented to Muslim parents' wishes to exempt their daughters from parts of the school curriculum that are considered in violation of their religious beliefs; allowed exemptions from animal protection laws that stand in the way of a religious diet; or forced public and private employers to accommodate the ritual needs of their Muslim employees.[26]

A particular case in point is the accommodation of the Muslim veil.[27] If wearing it is allowed, even for state agents who are expected to be neutral in their appearance, this is because the right of free religious expression is deemed superior to the rights of other involved parties or public order concerns. By the same token, if the veil is prohibited, as it has been for public school students under the French anti-veiling law of 2004 and for public school teachers in several regional anti-veiling laws in Germany in 2004 and 2005, this is because third-party rights or public order considerations have won the upper hand.[28] Overall, the highly publicized headscarf restrictions, all passed in the turmoil after 2001 and the global proliferation of Islamic terror, obscure the silent accommodation of most Muslim claims (including the claim to wear the veil) by the legal systems of Western states. The individual rights provisions of the liberal state have done much of the work that multiculturalists have wrongly charged their grander "recognition" campaigns with, only more quietly and effectively.

II. ANTIDISCRIMINATION

Whereas the thrust of multiculturalism is particularistic, seeking to perpetuate minority groups, the opposite thrust of antidiscrimination is universalistic, seeking to render minority groups invisible and in this sense to destroy them. The great ancestor of all contemporary antidiscrimination policies are the American civil rights laws, passed

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reduces the culpability of offenders who are deemed conditioned by their origin cultures (*see* ALISON DUNDES RENTELN, THE CULTURAL DEFENSE (2005).

[26] *See* Christian Joppke, *Successes and Failures of Muslim Integration in France and Germany*, *in* BRINGING OUTSIDERS IN: TRANSATLANTIC PERSPECTIVES ON IMMIGRANT POLITICAL INCORPORATION 115, 120-125 (Jennifer L. Hochschild & John H. Mollenkopf eds., 2009).

[27] See, e.g., in this issue, Gila Stopler, *Rights in Immigration: The Veil as a Test Case*, 43 ISR. L. REV. 183 (2010).

[28] *See* CHRISTIAN JOPPKE, VEIL: MIRROR OF IDENTITY (2009).

in the early to mid-1960s in order to end the racial segregation of American blacks. Their target is not "expressive racism," such as defamation or assault, but "access racism,"[29] which denies minorities equal participation in key societal sectors such as employment, education, and housing. If multiculturalism is situated in the lofty realm of culture and identity, antidiscrimination moves us into the mundane world of interest conflict over scarce resources.

It is safe to say that in the wake of post-WWII immigration, antidiscrimination laws and policies have massively increased throughout the Western world. Of particular significance is its development in the U.S., where a policy that had originally been conceived as a color-blind measure to combat discrimination against "any individual" on the basis of their "race, color, religion, sex, or national origin"[30] quickly turned into color-conscious affirmative action, in which specific, historically disadvantaged groups are selected for preferential access to important societal resources, most notably employment, business contracts, and higher education. U.S. antidiscrimination policies, thus, transformed from a notionally group-destroying into a factually group-making measure, no longer content with securing "equal opportunity" but rather aiming at "equal results" by means of quota and strict time-tables.[31]

While this transformation was accomplished by an obvious change of philosophy, it was still more the product of accident than of design. As the historian Hugh Davis Graham showed, the change from color-blindness to color-consciousness stemmed from the difficulties that federal agencies faced in effectively implementing the civil rights laws: "The problems and politics of implementation produced a shift of administrative and judicial enforcement from a goal of equal treatment to one of equal results."[32] It was much easier to identify discrimination by its (presumed) result than by its motivation. The watershed in this shift was in 1971 in the Supreme Court ruling of *Griggs v. Duke Power Company* that invalidated hiring practices and intra-company promotion schemes that were "fair in form, but discriminatory in operation."[33] Thus, the notion of indirect discrimination was born. It did not

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[29] I borrow the useful distinction between "expressive" and "access" racism from ERIK BLEICH, RACE POLITICS IN BRITAIN AND FRANCE: IDEAS AND POLICYMAKING SINCE THE 1960S 12-13 (2003).

[30] Civil Rights Act of 1964 title VII, sec. 701(b), July 2, 1964, 78 Stat. 241, which targets "unlawful employment practices."

[31] Still best on the distinction between equality of opportunity and equality of results is DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY 408-455 (1973).

[32] HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, 456 (1990). *See also* JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION (1996), who similarly grounds the rise of affirmative action in "administrative pragmatism."

[33] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

require identifying a discriminatory intention on the part of the employer; instead, the statistical under-representation of the discriminated group in the workforce was sufficient. Of course, such statistical discrimination, which happens whenever there is a "disproportionate" negative impact of a facially neutral measure on a minority group, is still attributed to originally overt discrimination. As the U.S. Supreme Court stated in *Griggs*, employment practices with such impact "operate to 'freeze' the status quo of prior discriminatory employment practices."[34] This is a rather daring leap of faith because zoomed out are innumerous other factors that might cause the statistical under-representation of a minority group.

But the crucial matter in *Griggs*'s invention, not of the name but of the concept of indirect discrimination,[35] is "abolishing the analytical distinction between antidiscrimination and affirmative action."[36] Remember that antidiscrimination, being color-blind, cuts both ways, prohibiting discrimination against whites *as well*. Affirmative action necessarily discriminates against whites (which is dubbed "reverse discrimination"). Prohibiting indirect discrimination erases the distinction between antidiscrimination and affirmative action, in that antidiscrimination now "requires *selection* of a limited number of reference groups within which all individuals will enjoy a specific kind of protection not available to members of other conceivable groups."[37] There can be no statistical under-representation without a preformed sense of the "groups" that are subject to this. And these groups are precisely those that once were targeted for overt, intentional discrimination. In a nutshell, there cannot be a fight against indirect discrimination that is not group-making or at least group-reinforcing.

The impetus of the transformation from antidiscrimination into affirmative action, much as of the original civil rights laws, was to help out the original victims and today's most disadvantaged members of American society, the descendants of African-American slaves. However, affirmative action was immediately extended to other historically disadvantaged groups: American Indians, Hispanics, and Asians (as well as women, not further considered here). The logic of this extension has never quite been unveiled. In John David Skrentny's stellar account of the American "minority rights revolution," it is not the pressure of social movements but the "anticipatory

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[34] *Id.* at 430.

[35] The words "indirect discrimination" do not appear in *Griggs v. Duke Power Co., id*.

[36] DANIEL SABBAGH, EQUALITY AND TRANSPARENCY: A STRATEGIC PERSPECTIVE ON AFFIRMATIVE ACTION IN AMERICAN LAW 123 (2007).

[37] *Id*.

politics" by enlightened state administrators that is responsible for this extension.[38] Administrators included groups "analogous to blacks," following a mostly implicit "logic of appropriateness" not unlike that of "bugs are not food."[39] All non-black groups "were all basically free rides, requiring virtually no lobbying or protest at all."[40] And if white ethnics, such as the working-class descendants of Polish or Italian immigrants who had heavily lobbied for inclusion in affirmative action between 1965 and 1975, were shown the door, this is because "they simply had not suffered enough."[41]

Regardless of the logic of carving out and delimiting the American affirmative action universe, immigrants who matched one of the protected groups were in it from the start.[42] This is because constitutional and statutory rights protections, including those provided by the 1964 Civil Rights Act and its creative reinterpretation by the civil rights bureaucracy, have always targeted "persons," not just "citizens." This meant that seventy percent of the 20 million immigrants entering America between 1965 and 1995 immediately profited from affirmative action.[43] This is because, after the de-racialization of U.S. immigration law in 1965, most newcomers would come from Latin America and Asia. They thus filled the "Hispanic" and "Asian" racial categories that are entitled to affirmative action, even though these newcomers themselves could not point to a history of injustice at the hands of white America.

However, the justification of affirmative action underwent a momentous shift in the U.S. Supreme Court's *Bakke* decision of 1978.[44] The famous swing opinion by Justice Powell, which tilted an evenly divided Supreme Court to support a qualified version of affirmative action, radically departed from the previous paradigm of corrective justice for minorities. As Powell pointed out, the "white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination."[45] If anything, the U.S. was a "[n]ation of minorities", each having had "to struggle—and to some extent [struggling] still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various

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[38] JOHN DAVID SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2002).

[39] *Id.* at 9-12.

[40] *Id.* at 141.

[41] *Id.* at 264.

[42] *See* HUGH DAVIS GRAHAM, COLLISION COURSE : THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA (2002).

[43] SABBAGH, *supra* note 36, at 39.

[44] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[45] *Id.* at 295.

minority groups."[46] If everyone was a minority, there was no longer any basis for preferential treatment. The only way in which "race" could be salvaged as a positive factor in college admissions was as a "plus" that helped universities build a "diverse student body" that was conducive to its educational mission of fostering a "robust exchange of ideas."[47] Thus, "diversity" was born, which has since become the main justification of affirmative action.

The new diversity paradigm had several advantages. As Justice Powell outlined in *Bakke*, it dispensed with "the kind of variable sociological and political analysis" that was required for determining who was "minority" or "majority" at any point in time, which was beyond the scope of "judicial competence" and better accomplished by Congress.[48] Diversity was, as Daniel Sabbagh sharply observed, a device for keeping race and antidiscrimination in the legal—as opposed to the political—arena. But, in addition to this strategic advantage, there were other, more substantive advantages.[49] Most importantly, only in the diversity paradigm did the inclusion of immigrants in affirmative action not constitute an anomaly.[50] Moreover, diversity legitimized the inherent tendency of affirmative action, fed by the apparatus engendered by it, to be in for the long haul, as now there was no need to identify the (necessary if impossible) moment when the last trace of past injustice would have been eradicated.

Finally, diversity provided the "missing link" between antidiscrimination and multiculturalism.[51] It had always been more than a coincidence that affirmative action had evolved side-by-side with multiculturalism, which in the U.S. is institutionalized above all in "minoritized" public-school and college curricula, and in a plethora of women's and ethnic and racial studies programs at the country's universities, especially the better ones. Through Sabbagh's rather dark lens, American multiculturalism—with its penchant for fostering "self-esteem" through ethno-racial perspectivism—is a "rationalization of the failure" that many an affirmative action students experienced at the elite university into which she or he was admitted.[52] This is most certainly exaggerated.[53] However, diversity's foot in both camps is evident in Justice Powell's

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[46] *Id.* at 292.
[47] *Id.* at 311 and 313, respectively.
[48] *Id.* at 297.
[49] SABBAGH, *supra* note 36, at 38.
[50] *Id.* at 43.
[51] *Id.* at 163.
[52] *Id.* at 156.
[53] *See* Mary Waters & Zoua M. Vang, *The Challenges of Immigration to Race-Based Diversity Policies in the United States, in* 3 BELONGING? DIVERSITY, RECOGNITION AND SHARED CITIZENSHIP IN

strange inference from race to a viewpoint and the ensuing equation of race with culture, which is a staple of multicultural discourse. To the degree that *Bakke* helped boost the multicultural notion of viewpoint diversity, American multiculturalism is indeed "partly a side effect of the juridicialization of political conflicts over the reduction of race-based inequality."[54]

Let us turn to Europe, in which antidiscrimination has never had similarly strong grounding in the domestic race issue. In Europe there is no legacy of domestic slavery and Jim Crow racism, which might have whipped European states onto the road of result-oriented racial equality. In fact, the command never, never to morph into affirmative action has from the start accompanied the first European antidiscrimination policy, which is the one of Britain.[55] While European antidiscrimination policies mostly concern immigrants and their descendents, it is still noteworthy that their earliest incarnations all occurred in societies where immigrants, through colonial linkages, either arrived as citizens or were able to acquire citizenship easily. Only if there is a sense that racial discrimination happens "within the political community," which again is conditional on "open citizenship laws,"[56] is there a likely push toward antidiscrimination. Accordingly, Germany—until recently a country with closed citizenship laws that kept immigrants and their descendents out of the political community—moved toward antidiscrimination only belatedly. In fact, Germany adopted an antidiscrimination law only due to external pressure by European Union law. How contested this move was, one may see in the fact that an otherwise moderate mind denounced it as "legal vandalism."[57]

Only in European states with a colonial legacy and historically open citizenship laws does antidiscrimination have domestic roots. In all other European states, antidiscrimination took hold only after the EU Race Directive was passed in 2000, which imposes the Anglo-Saxon type of civil-law based fight against "access racism" also on countries that had previously proceeded differently on the matter

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CANADA 433 (Keith Banting, Thomas J. Courchene & F. Leslie Seidle eds., 2007), who cite evidence that by means of affirmative action minorities have made "remarkable strides in education, particularly post-secondary education."

[54] SABBAGH, *supra* note 36, at 162.

[55] Steven M. Teles, *Why is There No Affirmative Action in Britain?* 41 AM. BEHAV. SCI. 1004 (1998).

[56] Jacqueline S. Gehring, *Hidden Connections: Citizenship and Anti-Discrimination Policy in Europe*, *in* CITIZENSHIP POLICIES IN THE AGE OF DIVERSITY: EUROPE AT THE CROSSROADS (Ricard Zapata-Barrero ed., 2009).

[57] Karl-Heinz Ladeur, *The German Proposal for an 'Anti-Discrimination'- law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann*, 3 GER. L.J. 1 (2002).

of discrimination,[58] if at all. The EU Race Directive requires member states to pass legislation that outlaws "direct or indirect discrimination based on racial or ethnic origin" within a narrow time frame.[59] Its scope is sweeping, including employment, education, social protection, health care, and access to vital private goods and services such as housing and insurance. As with the British antidiscrimination law on which the European law is modeled, the burden of proof is on the accused party to rebut "presumed" discrimination, and member states are obliged to create "a body or bodies for the promotion of equal treatment."[60]

The most important feature of the EU-led fight against discrimination is its inclusion of indirect discrimination.[61] This raises the question whether Europe is destined to go down the American road of latently group-making antidiscrimination policies. Interestingly, the EU Race Directive is at best permissive about the next logical step to tackling indirect discrimination, namely "positive action," which member states are "not prevent(ed)" from taking but also not mandated to do.[62] France, with its long-standing, Republican aversion to recognizing groups that stand in between the citizen and the state, deems itself immune to the virus of group recognition that is inherent in the principle of indirect discrimination. This is because of a clause inserted at France's behest in the Race Directive, which leaves "(t)he appreciation of the facts" about direct or indirect discrimination "a matter for national judicial or other competent bodies, in accordance with rules of national law or practice."[63] In short, France does acknowledge the existence of indirect discrimination but is not forced to collect the requisite statistical evidence to corroborate this fact.[64] But if one considers the EU campaign to "promote diversity,"[65] which has accompanied the European foray into antidiscrimination, there is no doubt that the latter cannot but be eventually group-

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[58] Especially France, which earlier used the penal law to combat "expressive" racism (see BLEICH, *supra* note 29, at chs. 5 & 6). Why France would strongly support a measure foreign to its legal tradition is persuasively explained by Virginie Guiraudon, *Construire une Politique Européenne de Lutte contre les Discriminations: L'Histoire de la Directive Race*, 53 SOCIÉTÉS CONTEMPORAINES 11 (2004).

[59] Council Directive 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000 O.J. 22-26).

[60] *Id.* at art. 13.

[61] *Id.* at art. 2.2(b).

[62] *Id.* at art. 5.

[63] *Id.* at preamble, "whereas."

[64] See Christian Joppke, *Transformation of Immigrant Integration: Civic Integration and Antidiscrimination in the Netherlands, France, and Germany*, 59 WORLD POL. 243, 262 (2007).

[65] European Commission, *Promoting Diversity*. DG4 Employment and Social Affairs 2002.

recognizing. This is simply inherent in the notion of diversity that has branched out from North America to Europe.

The so-called Veil Committee (chaired by *femme d'Etat* Simone Veil), charged with advising the current French President, Nicolas Sarkozy, on the wisdom of inserting a "diversity" clause into the French constitution that would allow him to venture toward "positive discrimination," recently rejected such a move resoundingly. The committee argued that the official recognition of race and ethnicity was a vestige of countries that had once practiced legal racial segregation. In France, by contrast, it threatened to "weaken national unity" (*affaiblissement du vivre-ensemble*) and to foster group conflict.[66] However, this defensive stance faces triple pressure by ethno-racial organizations, such as the *Conseil représentative des associations noires* (CRAN); by statisticians and demographers who ask for ethnicity-and race-sensitive measurements; and by corporations that push for "ethnic marketing" strategies and diversity as a tool to enhance their competitiveness.[67] Above all, the French President himself has vowed to continue with his project of injecting more "diversity" into the government and top-level public functions: "I am not in favor of quotas, which make no sense. But one can also not pretend that [a better representation of minorities in the French elites] will happen by itself, it will not happen by itself."[68] Interestingly, as the U.S. is increasingly questioning the wisdom of race-focused affirmative action, France, which had long prided itself on avoiding the Anglo-Saxon ways, is now cautiously, but steadily, moving in the American direction.

III. THE DECLINE OF MULTICULTURALISM AND THE RISE OF ANTIDISCRIMINATION

This leaves us with the startling fact that multiculturalism is in retreat, while antidiscrimination is on the rise. This contrast is especially marked in Europe. Consider that the few European countries that had pursued official multiculturalism policies in the past have recently shifted to civic integration policies; at the same time, European Union law and domestic pressures have boosted antidiscrimination to an unprecedented degree.[69] The ultimate source of the cooling down on multiculturalism

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[66] SIMONE VEIL, COMITÉ DE RÉFLEXION SUR LE PREAMBULE DE LA CONSTITUTION : RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE, Dec., 2008, at 57.

[67] Cécilia Gabizon, *La France dit non au fichage ethnique*, LE FIGARO, Dec. 9, 2008, at 2.

[68] Nicolas Sarkozy, quoted in *id.*

[69] These developments are discussed in Joppke, *Multicultural Citizenship*, *supra* note 18; Christian Joppke, *The Retreat of Multiculturalism in the Liberal State: Theory and Policy*, 55 BRIT.

is that liberal states are intrinsically geared "to treat people as individuals rather than as members of a class,"[70] leaving the constitution of social groups to the individuals themselves. This is the gist of universalistic citizenship that had once replaced the particularism of groups under feudalism. At the same time, liberal states seek to rectify inequalities and injustices, driven by their commitment to equality. This makes them favor antidiscrimination.

However, the distinction between multiculturalism and antidiscrimination is not as neat as it appears. This is because antidiscrimination tilts liberal states in the direction of group recognition that they philosophically abhor, forcing them to accept an unavoidable de facto multiculturalism.

Let us explore this paradox further. The fact that discrimination and inequality often "follow cultural boundaries" makes liberal states captive to a "dilemma of recognition."[71] If they embark on "targeted redistribution policies," examples for which are affirmative action in the U.S. or the positive discrimination that even France is poised to take, states cannot but engage in "definition, recognition, and even mobilization of the groups concerned," which often accentuates the ethnic or racial distinctions that the policies seek to attenuate or even eradicate.[72] As De Zwart argues, states have three possibilities to cope with the dilemma of recognition: They can "accommodate," which is multiculturalism; they can "deny," which is liberal color-blindness; or they can "replace" ethno-racial group distinctions with artificial proxy categories that avoid the freezing of ethno-racial distinctions that seems to be the drawback of accommodation. As both multicultural accommodation and liberal denial apparently proved inadequate to redress discrimination and inequality, states are increasingly pushed toward replacement strategies. Examples for replacement are the re-focusing of affirmative action from race to class, which is gaining ground in the U.S. or the use of geographic and socioeconomic proxies that France has long resorted to in her aversion to ethnicity and race (and now curiously finds insufficient), and which the Netherlands recently adopted in lieu of its old ethnic minorities' policy.

However, De Zwart's[73] global review of replacement strategies finds them incapable of resolving the dilemma of recognition. In the Netherlands, for instance,

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J. SOC. 237 (2004); Joppke, *Transformation*, *supra* note 64; and Christian Joppke, *Beyond National Models: Civic Integration Policies for Immigrants in Western Europe*, 30 W. EUR. POL. 1 (2007).

[70] Paul Starr, *Social Categories and Claims in the Liberal State, in* HOW CLASSIFICATION WORKS 156 (Mary Douglas & David Hull eds., 1992).

[71] Frank De Zwart, *The Dilemma of Recognition: Administrative Categories and Cultural Diversity,* 34 THEORY & SOC. 137, 142-144 (2005).

[72] *Id.* at 137.

[73] *Id.*

the citizenship-focused "general policy" that replaced the group-focused "categorical policy" in the 1990s has foundered over the need to identify target populations for effective policy intervention.[74] The Mayor of Amsterdam explained why subsidies for ethnic and subethnic "self-organizations" persisted despite the nominal withdrawal from them: "[W]e needed to contact society and in the process we as government … created the self-organizations ourselves, as it were"[75] and the groups that emerged were exactly those that stood to be replaced!

By the same token, the modicum of group recognition that persists with antidiscrimination is pragmatic, not philosophical; it is recognition by default in the pursuit of effective remedies to discrimination, especially at local level.[76] Such pragmatic recognition is a far cry from the principled "politics of recognition" decreed by Charles Taylor.[77] Recognition proper does have its field of application, but it is much narrower drawn than propagated by the multiculturalists. In fact, it closely overlaps with the politics of reparations, by means of which states have redressed historical injustice to particular groups.[78] The mistake was to prolong this paradigm to immigrants. Their very mobility has shown immigrants to be actors, not victims. And, as we have seen, they are actors with individual rights, which obliterate the group-focused program of multiculturalism.

CONCLUSION

This Article sharply contrasted multiculturalism and antidiscrimination as distinct ways of dispensing minority rights on immigrants. Using Charles Taylor's distinction between the politics of recognition and the politics of equal dignity, one could argue that multiculturalism follows the first, while antidiscrimination is part of the second.[79] The obvious riposte is that there is no clear distinction between the two, witness the author's own claims about the group-making implications of antidiscrimination. The American experience is indeed one where multiculturalism and antidiscrimination are

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[74] *See* Frank De Zwart & Caelesta Poppelaars, *Redistribution and Ethnic Diversity in the Netherlands*: *Accommodation, Denial and Replacement,* 50 ACTA SOCIOLOGICA 387 (2007).

[75] Quoted in De Zwart, *The Dilemma of Recognition*, *supra* note 71, at 155.

[76] *See also* Caelesta Poppelaars & Peter Scholten, *Two Worlds Apart: The Divergence of National and Local Immigrant Integration Policies in the Netherlands*, 40 ADMIN. & SOC. 335 (2008).

[77] TAYLOR, MULTICULTURALISM, *supra* note 10.

[78] JOHN TORPEY, MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS (2005).

[79] With customary lucidity, Steven Lukes has laid out this argument in a 1993 unpublished paper, "The Politics of Equal Dignity and the Politics of Recognition" (on file with the author).

closely interlinked; the former providing the rationale for the latter's turn from color-blindness to color-consciousness. More generally, multiculturalism, from Fanon on, is not conceivable outside of a context of discrimination, and, as Charles Taylor astutely pointed out, it thrives on a universalistic impulse of equality that it simultaneously undercuts. So can one really locate multiculturalism and antidiscrimination on opposite ends of the particularism vs. universalism spectrum, as suggested here?

The fact remains that multiculturalism is in retreat, while antidiscrimination is going from strength to strength—a duality that, to repeat, is especially noticeable in Europe. But, perhaps, multiculturalism's retreat is in name only, and it is alive and kicking under the new label of "diversity."[80] This claim trivializes real policy change that has occurred in previous strongholds of official multiculturalism, most notably the Netherlands. In fact, across liberal states there has been a new emphasis on binding immigrants into mainstream institutions and values instead of letting them drift apart in separate worlds. For this stand the new policy of civic integration and the reinforcement of citizenship as main instrument and end-point of integration. Secondly, a facile equation of diversity with multiculturalism obscures the new diversity discourse's subtle destruction of multiculturalism's minority-majority dualism and restitutive justice orientation, so that "a farm boy from Idaho" figures no differently than a black ghetto kid on the front of "achieving … educational diversity [at] Harvard College," to quote from Justice Powell's famous opinion in the U.S. Supreme Court's *Bakke* decision.[81] Finally, the simple name-change claim sits oddly with the fact that "diversity" is elastic enough to have become a new management philosophy, in France no less than in the U.S.[82]

The frontier of research is to investigate more closely the group-making that still occurs as a result of effective antidiscrimination in this changed context, which is philosophically individualistic and anti-groupist, in some places (like the Netherlands) not-so-subtly nationalistic. As suggested above, Europe is not poised to take the American road: a historical repeat of mutually reinforcing multiculturalism

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[80] This is the claim made by Steven Vertovec & Susanne Wessendorf, Assessing the Backlash against Multiculturalism in Europe, MMG Working Paper 09-04, Max Planck Institute for the Study of Religious and Ethnic Diversity (2009).

[81] *Regents of the University of California v. Bakke*, *supra* note 44, at 316.

[82] For the U.S., see Erin Kelly & Frank Dobbin, *How Affirmative Action became Diversity Management*, 41 AM. BEHAV. SCI. 960 (1998) ; for France, see Laure Bereni, '*Faire de la Diversité une Richesse pour l'Entreprise': La Transformation d'une Contrainte Juridique en Catégorie Managériale*, 35 RAISONS POLITIQUES 87 (2009).

and antidiscrimination is not on offer. In fact, the Veil report rejected a "diversity" commitment for the French state[83] because of a differently textured, less urgent ethno-racial situation in Europe. But one must also consider that the American experience of state-level race formation has been critically monitored abroad. If France, so far, has stayed away from ethnic statistics, from positive discrimination, and from replacing its socioeconomic and geographic proxy policies by an explicitly ethnic orientation, this is not only because of its own Republican aversion to intermediary groups, but also because there is no support for group-recognizing multiculturalism anywhere in Europe today. A stronghold for the latter is still the local level, because of ethnic group entrenchment in urban areas with high immigrant density and a need of local governments for problem recognition and finding concrete addressees for effective policy intervention. As Popelaars and Scholten show for the Netherlands, the result may be a radical divergence between national and local policy, national policy now being geared to the new civic integration and citizenship idiom, while local policy stays "multicultural," if more for "pragmatic" than principled reasons.[84]

When assessing the evolution of minority rights for immigrants, which has been the focus of this Article, two qualifications have to be made. First, the nucleus of immigrant rights is alien rights, not minority rights. Alien rights accrue to immigrants *qua* immigrants, not *qua* ethnic group membership. Rights of residence, work, welfare, and family reunion, one may reasonably argue, are what *really* matter to immigrants, and they are dispensed to them on the basis of legal immigrant status, irrespective of their ethnicity. Under an individual-focused, global human rights regime, alien rights have significantly expanded after WWII, so much so that some authors have argued (prematurely in my view) that "citizenship" no longer mattered to immigrants.[85] Alien rights, not minority rights, are the true theatre of rights expansion or contraction for immigrants.[86] Second, with respect to minority rights, immigrants tap into a domain that has been historically carved out for other groups, most notably the descendants of African slaves in the U.S., and national minorities that have seen state borders move above their heads in Europe. In the U.S., immigrants profited from

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[83] VEIL, *supra* note 66.

[84] Poppelaars & Scholten, *supra* note 76, at 348-50.

[85] YASEMIN SOYSAL, LIMITS OF CITIZENSHIP (1994); DAVID JACOBSON, RIGHTS ACROSS BORDERS (1996).

[86] For rights expansion, see SOYSAL, *supra* note 85, and JACOBSON, *supra* note 85*; see also* Christian Joppke, *The Legal-Domestic Sources of Immigrant Rights: The United States, Germany, and the European Union*, 34 COMP. POL. STUD. 339 (2001). For rights contraction, especially after 2001, see CHRISTIAN JOPPKE, CITIZENSHIP AND IMMIGRATION 91-95 (2010).

a historically thin citizenship construct and from the fact that "persons," not "citizens," are endowed with key constitutional rights, most notably that of equal protection under the Fourteenth Amendment. Immigrants' inclusion in affirmative action privileges is due to this historical accident. In Europe, there has been considerable resistance to including immigrants in existing minority policies, which had been devised for the historical victims of nation-state building, and for which international law stipulates the condition of citizenship in the rights-granting state. This may be the reason for the shallowness of multiculturalism policies for immigrants in Europe, even at their historical peak. And note that the reversal of these policies for immigrants has never extended to their original beneficiaries, national minorities, for whom multicultural minority rights are as uncontested and firmly in place as ever.

Finally, the thrust of this article was conceptual, not empirical. It contrasted two modes of minority rights for immigrants, illustrating them with examples drawn from Europe and the U.S. The next step would be a stricter cross-national or cross-regional comparison, which requires unfolding the many, often conflicting if not contradictory, national and sub-national, as well as cross-sectional, realities that had to remain hidden under the "Europe" versus "America" umbrellas.